UNILEVER (M) HOLDINGS SDN BHD v. SO LAI & ANOR

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
JEFFREY TAN FCJ
MOHAMED APANDI ALI FCJ
AZIAH ALI JCA
[CIVIL APPEAL NO: 01(f)-3-02-2014-(J)]
9 APRIL 2015
[2015] CLJ JT(4)

LABOUR LAW: *Industrial Court – Award – Compensation in lieu of reinstatement – Employee attained age of retirement – Whether employee could be reinstated – Whether award of compensation could be allowed when reinstatement could not be ordered – Whether employee must be in position to be reinstated – Industrial Relations Act 1967, ss. 20(1) & 30(5)*

WORDS AND PHRASES: *'compensation in lieu of reinstatement' – Meaning of – Whether compensation a replacement or substitute or alternative to reinstatement – Industrial Relations Act 1967, s. 20(1)*

The first respondent had been in the employment of the appellant company for 17 years before he was dismissed. At the time of his dismissal, the first respondent was 14 months away from his mandatory retirement at the age of 55 years. The first respondent challenged his dismissal in the Industrial Court pursuant to s. 20 of the Industrial Relations Act 1967 ('the IRA'). The Industrial Court decided in favour of the first respondent and awarded compensation *in lieu* of reinstatement and backwages for 24 months. Dissatisfied with the award, the appellant applied to the High Court for an order of *certiorari* to quash the award under O. 53 of the Rules of the High Court 1980. The application was however dismissed by the High Court. Instead, the High Court upheld the award of compensation *in lieu* of reinstatement but the award in respect of backwages was reduced from 24 months to 14 months, namely, the period of retirement age of the first respondent at 55. On appeal, the Court of Appeal dismissed the appellant's appeal and affirmed the decision of the High Court in respect of the compensation awarded. Leave was granted to the appellant to appeal on the question of law of whether compensation *in lieu* of reinstatement could be awarded to a person who could not be reinstated and/or whether the issue of reinstatement even arose as he had already attained the age of retirement at the time of the filing of his claim. The appellant submitted that the primary remedy as reflected under s. 20(1) of the IRA is for a reinstatement of the complainant and further contended that although s. 30(5) of the IRA empowers the Industrial Court to act in accordance with equity, good conscience and substantial merits of the case without regard to technicalities and legal form, it does not confer the court with the power to order

compensation *in lieu* of reinstatement if a person is not in a position to be reinstated in the first place. The first respondent, on the other hand, submitted that compensation *in lieu* of reinstatement is permissible under the Industrial Court Practice Note No. 1 of 1987 ('the Practice Note'). Hence, the issue for the court's determination was whether an award of compensation could be allowed when reinstatement could not be ordered.

Held (allowing appeal; setting aside order made by courts below)
Per Mohamed Apandi Ali FCJ delivering the judgment of the court:

(1) The leave question was related to a claim under s. 20 of the IRA as well as 'compensation *in lieu* of reinstatement'. The key words '*in lieu* of' and 'reinstatement' are not defined in the IRA. The Law Lexicon defined '*in lieu* of' as signifying 'instead of' and 'in place of'. Therefore, reading the words, 'compensation *in lieu* of reinstatement' in plain English means that such compensation was meant to be a replacement or a substitute or an alternative to reinstatement. (para 19)

(2) From the phrase 'compensation *in lieu* of reinstatement', the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. This was fortified by the clear provision of s. 20(1) of the IRA where the primary remedy of such a representation is for the workman 'to be reinstated in his former employment'. If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise and hence it cannot be *in lieu* of his reinstatement. Reinstatement is a statutorily recognised form of specific performance and as such it could only be ordered in a situation where the legal basis for such performance exists. (para 20)

(3) The court had no reason to disagree with the legal pronouncement by the Court of Appeal in *Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia* that the Industrial Court 'fell into error when it awarded compensation *in lieu* of reinstatement when clearly the second respondent cannot be reinstated beyond his retirement age. The Industrial Court had no legal basis to award ... compensation *in lieu* of reinstatement'. (paras 23 & 24)

(4) The Practice Note is in reality an internal administrative circular meant to be a guideline in calculating compensation. Such circular does not have the force of law. The Practice Note cannot be construed as a statement of legal principle and it will be erroneous to do so. A careful reading of the Practice Note will reveal that it is silent on the issue of whether the worker is still eligible to be reinstated at the material time when the award is made. The Practice Note cannot be taken to be a concept stipulating that it is a *carte blanche* for compensation to be awarded (in all cases) *in lieu* of reinstatement. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama telah bekerja dengan syarikat perayu selama 17 tahun sebelum dia dibuang kerja. Pada masa pembuangan kerjanya, responden pertama hanya 14 bulan daripada umur persaraan mandatori 55 tahun. Responden pertama mencabar pembuangan kerjanya di Mahkamah Perusahaan menurut s. 20 Akta Perhubungan Perusahaan 1967 ('Akta'). Mahkamah Perusahaan membuat keputusan memihak kepada responden pertama dan mengawardkan pampasan sebagai ganti pengambilan semula dan gaji kebelakangan bagi 24 bulan. Tidak berpuas hati dengan award tersebut, perayu memohon kepada Mahkamah Tinggi bagi perintah *certiorari* untuk membatalkan award tersebut di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan tersebut walau bagaimanapun ditolak oleh Mahkamah Tinggi. Sebaliknya, Mahkamah Tinggi mengesahkan award pampasan sebagai ganti pengambilan semula tetapi award berkaitan dengan gaji kebelakangan dikurangkan daripada 24 bulan kepada 14 bulan, iaitu, tempoh umur persaraan responden pertama pada 55 tahun. Atas rayuan, Mahkamah Rayuan menolak rayuan perayu dan mengesahkan keputusan Mahkamah Tinggi berkaitan dengan pampasan yang diawardkan. Kebenaran diberikan kepada perayu untuk merayu atas persoalan undang-undang sama ada pampasan sebagai ganti pengambilan semula boleh diawardkan kepada seseorang yang tidak boleh diambil semula dan/atau sama ada isu pengambilan semula wujud sama sekali kerana seseorang itu telah mencapai umur persaraan pada masa pemfailan tuntutannya. Perayu menghujahkan bahawa remedi utama seperti yang diperuntukkan di bawah s. 20(1) Akta adalah untuk pengambilan semula pengadu dan selanjutnya menghujahkan bahawa walaupun s. 30(5) Akta memberikan kuasa kepada Mahkamah Perusahaan untuk bertindak menurut ekuiti, niat baik dan merit penting kes tanpa mengendahkan keteknikan dan bentuk undang-undang, ia tidak memberikan kepada mahkamah kuasa untuk memerintahkan pampasan sebagai ganti pengambilan semula jika seseorang itu tidak berada dalam kedudukan untuk diambil semula. Responden pertama, sebaliknya, menghujahkan bahawa pampasan sebagai ganti pengambilan semula adalah dibenarkan di bawah Nota Amalan Mahkamah Perusahaan No. 1 Tahun 1987 ('Nota Amalan' tersebut). Dengan itu, isu untuk pertimbangan mahkamah adalah sama ada award pampasan boleh dibenarkan apabila pengembalian semula tidak boleh diperintahkan.

Diputuskan (membenarkan rayuan; mengenepikan perintah yang dibuat oleh mahkamah bawahan)

Oleh Mohamed Apandi Ali HMP menyampaikan penghakiman mahkamah:

(1) Persoalan kebenaran adalah berkaitan dengan tuntutan di bawah s. 20 Akta dan juga 'compensation *in lieu* of reinstatement'. Perkataan-perkataan utama '*in lieu* of' dan 'reinstatement' tidak ditakrifkan dalam Akta. Law Lexicon menentukan '*in lieu* of' sebagai 'sebaliknya' dan di

tempat'. Oleh itu, membaca perkataan-perkataan 'compensation *in lieu* of reinstatement' dalam Bahasa Inggeris membawa makna bahawa pampasan sedemikian adalah bermaksud sebagai ganti atau di tempat atau sebagai alternatif kepada pengambilan semula.

(2) Daripada frasa 'compensation *in lieu* of reinstatement', unsur pampasan hanya akan berbangkit apabila pekerja berada dalam kedudukan atau situasi boleh diambil semula. Ia adalah syarat awalan bagi pampasan tersebut. Ini diperkuatkan lagi oleh peruntukan jelas s. 20(1) Akta di mana remedi utama representasi tersebut adalah bagi pekerja 'diambil semula dalam pekerjaan lamanya'. Jika pekerja tidak boleh diambil semula kerana umurnya telah melebihi umur persaraannya, isu pampasan tidak berbangkit dan oleh itu, ia tidak boleh dijadikan sebagai ganti pengambilan semula. Pengambilan semula adalah suatu bentuk pelaksanaan spesifik yang diiktiraf dari segi statut dan oleh itu ia hanya boleh diperintahkan dalam keadaan di mana asas undang-undang bagi pelaksanaannya wujud.

(3) Mahkamah tidak ada alasan untuk tidak menyetujui penyataan undang-undang oleh Mahkamah Rayuan dalam kes *Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia* bahawa Mahkamah Perusahaan 'fell into error when it awarded compensation *in lieu* of reinstatement when clearly the second respondent cannot be reinstated beyond his retirement age. The Industrial Court had no legal basis to award ... compensation *in lieu* of reinstatement.'

(4) Nota Amalan adalah sebenarnya pekeliling pentadbiran dalaman yang dimaksudkan sebagai panduan dalam pengiraan pampasan. Pekeliling sedemikian tidak mempunyai kekuatan undang-undang. Nota Amalan tidak boleh ditafsirkan sebagai kenyataan prinsip undang-undang dan adalah salah untuk berbuat demikian. Pembacaan teliti Nota Amalan akan mendedahkan bahawa ia tidak menyatakan apa-apa berkaitan isu sama ada seseorang pekerja masih layak untuk diambil semula pada masa material award dibuat. Nota Amalan tidak boleh dianggap sebagai suatu konsep yang menyatakan bahawa ia adalah *carte blanche* bagi pampasan diawardkan (dalam kesemua kes) sebagai ganti pengambilan semula.

Case(s) referred to:

Chong Lam Hong v. KA Panel Technology Printers Sdn Bhd [2008] 2 LNS 115 ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(refd)***

Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd [2001] 8 CLJ 180 HC ***(refd)***

Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(refd)***

Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***

Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin [2002] 1 ILR 280 ***(refd)***

Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor [2014] 8 CLJ 876 CA ***(refd)***

Telekom Malaysia Bhd v. Ramli Akim [2008] 1 CLJ 440 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), 30(5)
Rules of the High Court 1980, O. 53

For the appellant - Thavalingam Thavarajah (Lisa Tan Yu Wan with him); M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Ong Chee Yong; M/s CY Ong & Co

Reported by S Barathi

JUDGMENT

Mohamed Apandi Ali FCJ:

Leave Question

[1] This court had, on 6 January 2014, granted leave to the appellant to appeal on a single question of law, which reads:

> Whether compensation *in lieu* of reinstatement can be awarded to a person who cannot be reinstated and/or whether the issue of reinstatement even arises as he had already attained the age of retirement at the time of the filing of his claim (under s. 20 of the Industrial Relations Act 1967).

Background Facts

[2] The salient facts of this case which are not disputed are as follows. So Lai @ Soo Boon Lai ("the first respondent") had been in the employment of the appellant company for 17 years when he was dismissed on 14 March 2001. He was then a Redistribution stockist operation supervisor and his dismissal was consequential to a domestic enquiry conducted by the appellant company, based on allegations of receiving unauthorised payments from a complainant, one Tey Hup Heng Trading Sdn Bhd. At the time of his dismissal, the first respondent was, according to his terms and conditions of service, only 14 months away from his mandatory retirement age of 55 years. He was deemed to have started working with the appellant company since 22 February 1984, after the appellant bought over the business from his earlier employer company in 1995.

[3] The first respondent challenged his dismissal by filing a complaint to the Industrial Court ("the second respondent") pursuant to s. 20 of the Industrial Relations Act 1967 ("the IRA 1967"). The Industrial Court decided in favour of the first respondent and proceeded to award compensation *in lieu* of reinstatement, calculated based on the first respondent years of service and in addition awarded backwages for 24 months.

[4] Being dissatisfied with the Industrial Court's decision, the appellant filed for judicial review under O. 53 of the Rules of the High Court 1980 and applied for an order of *certiorari* to quash the said award.

[5] The application for *certiorari* was dismissed by the High Court. The award on dismissal was upheld. The award on compensation *in lieu* of reinstatement was also upheld but the award in respect of backwages was reduced from 24 months to 14 months, namely the period to the retirement age at 55, of the first respondent.

[6] On appeal, the Court of Appeal dismissed the appellant's appeal and affirmed the decision of the High Court, in respect of the compensation awarded.

Findings By The High Court

[7] In view of the narrow scope of the leave question posed to this court, it is pertinent to highlight only parts of the judgment of the High Court relating to the issue at hand, namely compensation *in lieu* of reinstatement when the dismissed employee had already attained the age of retirement at the time of filing his claim under s. 20 of the IRA 1967.

[8] On this issue, the learned Judicial Commissioner in his grounds of judgment, observed as follows:

> There are two aspects to the compensation awarded by the ICC. The first is as regards backwages. The ground of challenge of A was that the ICC had acted on an incorrect basis of fact and erred in law in awarding backwages for 24 months amounting to RM196,718 when C was only 14 months away from retirement age (55 years).
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> It is trite law that backwages from the time of dismissal up to the date of the award that are payable to the workman who is unfairly dismissed may be ordered in full up to a maximum of 24 months. (See: *Thilagavathy Alagan Muthiah v. Meng Sing Glass Sdn Bhd & Anor* [1997] 4 CLJ Supp 368 per Abdul Kadir Sulaiman, J (as he then was)). The 24 months' period is the maximum and is not to be awarded in every case of wrongful dismissal. The correct practice based on authorities is to consider the retirement age of the workman and the remaining years of employment. In this regard, the decision of the ICC to award backwages for a 24 months' period when A had only 14 months left before retirement under his terms of employment with A was clearly an error of law and could not be sustained.
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> However, with respect to the award for compensation *in lieu* of reinstatement for which the ICC awarded 17 months multiplied by C's monthly emoluments based on his years of service with A, there is no authority that the award under this head should be limited to the number of years remaining in his employment at the time of dismissal. A relied merely on what was said in *obiter* in *Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd* [2001] 8 CLJ 180 that the Industrial Court was wrong to award this head of compensation for 18 months based on years of service when the employee had only ten months left in his employment until retirement at the time of dismissal.

C submitted that unlike in the present case, in *Hj Md Ison Baba (supra)* the claimant had also received a gratuity under the Group Pension Scheme as well as other retirement benefits. Therefore, to grant a further ten months' salary as compensation *in lieu* of reinstatement could amount to double compensation which the law does not permit. In the instant case, the Industrial Court did not award C any retirement benefits to which C would have been entitled had he reached the age of 55 years. Reference was made to the Federal Court case of *Rama Chandran v. Industrial Court of Malaysia* [1997] 1 CLJ 147 where in awarding the claimant future loss of earnings limited to the date of retirement, Edgar Joseph Jr FCJ stated:

> I would say that the Employee is entitled to all moneys due to him in respect of his salary and all other emoluments, under his contract of service, as from the date of his invalid dismissal until his retirement had he not been wrongfully dismissed.

Also to the principle that the ICC should adopt a flexible and non-technical approach in making its award by referring to *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 where Abdul Hamid, JCA (as he then was) held:

> … it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The industrial Court should be allowed to conduct its proceedings as a "court of arbitration", and be more flexible in arriving at its decision, so long as it gives special regard to the substantial merits and decide a case in accordance with equity and good conscience.

Based on the above circumstances and position in law on compensation to be awarded by the Industrial Court, I held that the award of compensation *in lieu* of reinstatement for 18 months and not limited to the remaining period of employment before retirement was not shown to be an error of law or flawed on the facts. This head of award should be distinguished from backwages which was subject to the said limit. Hence, I held that there were no valid grounds to warrant an interference with this award.

Findings By The Court Of Appeal

[9] The Court of Appeal merely affirmed the decision of the High Court, and *inter alia*, held as follows:

> On the awards granted by the 2nd respondent to the 1st respondent, we are of the considered view that the learned Judicial Commissioner had correctly affirmed the award of compensation *in lieu* of reinstatement for seventeen (17) months granted by the 2nd respondent because such award is not limited to the remaining period of employment until his retirement. This award should be distinguished from the award for backwages which is subject to such limitation.

A We also find that the learned Judicial Commissioner was right when holding that there were valid grounds to warrant an interference and consequently reduced the award for backwages from twenty-four (24) months to fourteen (14) months amounting to RM67,172.00. The reason being the 1st respondent had only fourteen (14) months left before his retirement under his terms of employment with the Appellant. The 2nd B respondent therefore erred in awarding backwages for twenty-four (24) months to the 1st respondent. (See: *Thilagavathy Alagan Muthiah v. Meng Sing Glass Sdn Bhd & Anor* [1997] 4 CLJ Supp 368).

Submissions By Parties

C **[10]** Learned counsel for the appellant submitted that the primary remedy as reflected under s. 20(1) of the IRA 1967 is for a reinstatement of the complainant. He relied on a High Court decision in *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 which held that:

D [1] … It would clearly appear therefore that if a workman does not require reinstatement, there would not be a reference to the Industrial Court under s. 20(3) of the IRA 1967.

[5] The respondent clearly could not come within the provision of s. 20(1) and (3) of the IRA 1967 as the Legislature intended that recourse to the E Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have jurisdiction. In this case, as the respondent did not want her job back as she is now gainfully employed, there was no basis for awarding damages or compensation *in lieu* of reinstatement. The award of the Industrial Court was accordingly quashed.

F **[11]** The appellant also argued that although s. 30(5) of the IRA 1967 empowers the Industrial Court to act in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, it does not confer the court the power to order compensation *in lieu* of reinstatement if a person is not in a position to be G reinstated in the first place. Learned counsel, on this point, relied and referred to the case of *Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin* [2002] 1 ILR 280, where the Industrial Court held:

The only remedy specifically identified in the Act is the order for the reinstatement of an employee. A workman who wishes to invoke the H jurisdiction of the court to inquire into his complaint that he had been dismissed without just cause or excuse under s. 20 of the Industrial Relations Act 1967 must initiate the process by making a representation that he be reinstated to his former employment. The remedy of reinstatement seems to be granted *uno flatu* with the cause of complaint of unjust dismissal. It is in this sense that in industrial jurisprudence it is I well-recognised that reinstatement is the primary remedy for an employee who had been dismissed without just cause or excuse. An award of backwages is the consequential part of the order directing the reinstatement of a workman.

[12] The appellant further relied on the Court of Appeal decision in *Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor* [2014] 8 CLJ 876, which held:

> [9] As stated earlier, the only complaint by the appellant in this present appeal is that there is no legal basis for the Industrial Court award, which was upheld by the High Court, compensation *in lieu* of reinstatement to the second respondent as the issue of reinstatement does not arise. This is because at the time of the award the second respondent had already attained the age of retirement. In support learned counsel for the appellant referred to us the decision of the High Court in *Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd* [201] 8 CLJ 180 where KC Vohrah J (as he then was) held as follows:
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> > It will be noted that the Industrial Court not only awarded a sum equivalent to ten months' salary as backwages but also 18 month's salary (one month for every for every year of completed service) as compensation *in lieu* of re-instatement. Swedish Motor has pointed out that the compensation *in lieu* of re-instatement does not arise at the time the Industrial Court computed the compensation payable to Md Ison as he had already reached his retirement age and could not been reinstated beyond his retirement age. From the evidence it seems clear that if Md Ison had not been dismissed but had been allowed to retire he would have only received ten month's salary plus a gratuity of RM82,091.37 from the Group Pension Scheme.
> >
> > While I cannot see any merit in the 1st ground that the Industrial Court erred in law when it held that Md Ison was only required to be paid a sum equivalent to 10 month's salary as back-wages using 55 years as the age of retirement it appears to me that the Industrial Court was wrong in awarding the equivalent of 18 month's salary as compensation *in lieu* of reinstatement when the Court was not entitled to do so.
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> [11] We accept the principle that in awarding compensation to an employee who is found to be dismissed without just cause, the Industrial Court must act according to equity, good conscience and substantial merit of the case as required under s. 30(5) of the IRA 1967. But there must be a legal basis for the Industrial Court to award such compensation. The Federal Court in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109 speaking through Salleh Abas FJ (as he then was) at pp. 112-113 said:
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> > If there is a legal basis for paying compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under s. 30 of the Industrial Relations Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.

A [12] Applying the above principle to the facts of the instant case, we are of the view that there is no legal basis for the second respondent to be awarded compensation *in lieu* of reinstatement. The award of compensation *in lieu* of reinstatement assumes that the second respondent who has been dismissed has to be reinstated in his employment as at the date of the award. Obviously, the second respondent could not be
B reinstated or in a position to be reinstated when he was already as at the date of the award reached or passed the retirement age. Thus, the issue of paying the second respondent that compensation *in lieu* of reinstatement does not arise. Such compensation can only be ordered if at the date of the award he had not reached his age of retirement. But as stated earlier, the second respondent had well passed his retirement
C age. Thus, we adopt the view expressed by KC Vohrah J (as he then was) in the case of *Haji Md Ison Baba v. Swedish Motro Assemblies Sdn Bhd (supra)* wherein His Lordship held that compensation *in lieu* of re-instatement does not arise in cases where the employee has reached his retirement age.

D [13] Thus, it is our finding that the Industrial Court in the instant case fell into error when it awarded compensation *in lieu* of reinstatement when clearly the second respondent cannot be reinstated beyond his retirement age. The Industrial Court had no legal basis to award the second respondent compensation *in lieu* of reinstatement. Thus, there was an error on the face of the record and the award should be quashed.

E **[13]** Learned counsel for the first respondent however canvassed that compensation *in lieu* of reinstatement is permissible under the Industrial Court Practice Note No. 1 of 1987 and in support of such argument, learned counsel relied on the Court Appeal decision in *Telekom Malaysia Bhd v. Ramli Akim* [2008] 1 CLJ 440. Learned counsel also relied on the judgment of this
F very case at the Court of Appeal, where the court in essence held that "… such award is not limited to the remaining period of employment. This award should be distinguished from the award for backwages which is subject to such limitation".

G **[14]** The first respondent also relied on the case of *Chong Lam Hong v. KA Panel Technology Printers Sdn Bhd* [2008] 2 LNS 115, which relied on the Federal Court case of *Dr A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 in his argument that the Industrial Court is authorised to award compensation where reinstatement is not appropriate.

H **Analysis And Decision**

[15] At the outset, it must be acknowledged that under the IRA 1967 the Industrial Court has the power to make an order for reinstatement or an award of compensation *in lieu* of reinstatement. The core issue at hand, is whether an award of compensation can be given when reinstatement cannot
I be ordered.

[16] Before we embark on our analysis of the respective submission, it may be appropriate to appraise the facts of the case, namely the attainment of the age of retirement of the first respondent. This undisputed fact can be seen from the findings of the Industrial Court, which, *inter alia* reads:

> Seterusnya, Mahkamah perlu menimbangkan sama ada adalah sesuai untuk Pihak Menuntut ditempatkan semula di syarikat Responden. Pihak Menuntut telah dibuang kerja pada 14 Mac 2001. Semasa award ini diturunkan, sudah hampir 10 tahun dari tarikh Pihak Menuntut dibuang kerja. Di samping itu, Pihak Menuntut juga telah menjangkau usia persaraan. Oleh itu, Mahkamah berpendapat adalah tidak sesuai untuk Pihak Menuntut ditempatkan semula di syarikat Responden berdasarkan kepada alasan dan keadaan di atas. Oleh itu, Mahkamah berpendapat remedi yang bersesuaian ialah pampasan galang ganti penempatan semula.

[17] The leave question speaks of a claim under s. 20 of the IRA 1967, where the relevant parts read as follows:

> 20. Representations on dismissals
>
> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General **to be reinstated in his former employment;** the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
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> (1A) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
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> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.
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> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
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> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.
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> (4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.

[18] In making such an award, the court is governed by s. 30 of the IRA 1967, which reads as follows:

30. Awards

(1) The Court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under subsection 20(3), to make an award (Including an interim award) relating to all or any of the issues.

(2) Where the Court is not unanimous on any question or matter to be determined, a decision shall be taken by a majority of members and, if there is no majority decision, by the President or Chairman.

(3) The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under subsection 20(3).

(4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

*(5A) In making its award, the Court may take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister.

(6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under subsection 20(3).

(6A) Notwithstanding subsection (6), the Court in making an award in relation to a reference to it under subsection 20(3) shall take into consideration the factors specified in the Second Schedule.

(7) An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award:

Provided that the retrospective date of the award may not, except in the case of a decision of the Court under section 33 or an order of the Court under paragraph 56(2)(c) or an award of the Court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, be earlier than six months from the date on which the dispute was referred to the Court.

(8) The award of the Court shall be signed by the President or the Chairman of any Division or in the event of the President or the Chairman for any reason being unable to sign the award by the remaining members.

(9) The Court may rectify in any award any clerical error or mistake arising from any accidental slip or omission.

[19] The leave question also speaks of "compensation *in lieu* of reinstatement". The key words "compensation", "*in lieu* of" and "reinstatement" are not defined in the IRA 1967. The Law Lexicon defines "*in lieu* of"' as signifying "instead of" and "in place of". Therefore reading the words "compensation *in lieu* of reinstatement" in plain English it means that such compensation was meant to be a replacement or a substitute or an alternative to reinstatement.

[20] From the phrase "compensation *in lieu* of reinstatement", it is our judgment that the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s. 20(1) of the IRA 1967, where the primary remedy of such a representation to the Director General is for the workman "to be reinstated in his former employment". If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be *in lieu* of his reinstatement. After all, reinstatement is a statutorily recognised form of specific performance. On that premise, such specific performance can only be ordered in a situation where the legal basis for such performance does exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: "*lex non cogit ad impossibilia*", ie, the law does not compel the impossible.

[21] Even though s. 30(5) of the IRA 1967 speaks of the court shall act "according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form", there must be a legal basis for such as action. On this, it would be suffice to refer to the judgment of Salleh Abas FJ (as he then was) in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109, which reads as follows:

> The next point which I have to consider is the basis how and why the President gave an award of compensation of two months' salary and fixed allowances against the Hotel. I tried to find the basis why compensation is paid at all. If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under s. 30 of the Industrial Relations Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.

[22] In a similar vein, KC Vohrah J in *Hj Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd* [2001] 8 CLJ 180, wrote as follows:

> As I had mentioned Md Ison had only ten months to go before reaching retirement age when he was unfairly dismissed. Reinstatement was inappropriate as he was virtually on the verge of retirement even if the

Industrial Court had decided the matter before his retirement. OA Malhotra in *The Law On Industrial Dispute,* 2 edn, vol 11 at p. 941 has this to say on a similar matter:

> On the facts and circumstances of the case, the award of reinstatement was held to be inappropriate. Such a relief can also be refused where the workman is virtually on the verge of retirement or is so old and infirm as to be incapable of discharging his duties. In *Management of Metal Box of India Ltd v. Presiding Officer*, Additional Labour Court, Madras CA No 18 (NL) of 1983 arising out of SLP No 9851 of 1982 decided by the Supreme Court on January 3, 1983, the court modified the order of reinstatement in view of the superannuation of the workman and directed the payment of backwages and other benefits up to the date of retirement of the workman.

It will be noted that the Industrial Court not only awarded a sum equivalent to ten months' salary as back-wages but also 18 months' salary (one month for every year of completed service) as compensation *in lieu* of re-instatement. Swedish Motor has pointed out that the compensation *in lieu* of re-instatement does not arise at the time the Industrial Court computed the compensation payable to Md Ison as he had already reached his retirement age and could not be re-instated beyond his retirement age. From the evidence it seems clear that if Md Ison has not been dismissed but had been allowed to retire he would have only received ten months' salary plus a gratuity of RM82,091.37 from the Group Pension Scheme.

While I cannot see any merit in the 1st ground that the Industrial Court erred in law when it held that Md Ison was only required to be paid a sum equivalent to ten months' salary as backwages using 55 years as the age of retirement it appears to me that the Industrial Court was wrong in awarding the equivalent of 18 months' salary as compensation *in lieu* of re-instatement when the court was not entitled to do so.

[23] The above analysis formed the rationale of the Court of Appeal's decision in *Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor* [2014] 8 CLJ 876, Raus Sharif PCA concluded that the Industrial Court "fell into error when it awarded compensation *in lieu* of reinstatement when clearly the second respondent cannot be reinstated beyond his retirement age. The Industrial Court had no legal basis to award … compensation *in lieu* of reinstatement".

[24] For reasons explained above, we see no reason to disagree with that particular legal pronouncement.

[25] For completeness, perhaps it is proper to analyse the reason for such errors to have been committed over the years. To our mind the error lies in the confusion that emanates from the misapprehension of what is known as Practice Note No. 1 of 1987. Practice Note No. 1 of 1987, is reproduced *in extenso* and reads as follows:

SULIT

Practice Note No. 1 of 1987
Guide Lines on Dismissal Cases

1. Practice Note No. 2 of 1981 is replaced by this Practice Note.

2. If the dismissal is with "just cause of excuse" the case is dismissed without any payment of compensation or benefit.

3. If the dismissal is **without** "just cause or excuse", the Court shall:

   EITHER

   (a) Direct the employer to reinstate the workman in his former employment and to pay the workman an amount equivalent to the wages that he would have earned had he not been dismissed.

   OR

   (b) Direct the employer to pay such amount of wages as **compensation** as may be determined by the Court.

4. **METHOD OF CALCULATION OF COMPENSATION**

   (a) Backpay in full from date of dismissal to date of conclusion of hearing, subject to a maximum of 24 months.

   (b) Compensation *in lieu* of reinstatement of one month's pay for each year of completed service subject to a maximum of 24 months.

   (c) **Mitigation against loss**

   It shall be the duty of the Claimant to mitigate against loss but the burden of proving that the Claimant has not done so lies with the Company. Such mitigation shall be against backpay only [para 4(a) above] and not compensation *in lieu* of reinstatement [para 4(b) above]. There shall be no deduction if the Claimant has not been able to secure any employment since the date of his dismissal. If he has been able to secure employment or partial employment, then backpay can be reduced up to 50%. In any event, the Claimant may be awarded his compensation *in lieu* of reinstatement in full, unless there is a scheme to pay such benefit to the EPF Board, in which case, the award is to be reduced accordingly.

   (d) **Contributory conduct**

   If the matter to which the claim relates was to any extent caused by or contributes to by any action of the Claimant, the Court may reduce the backpay [para 4(a) above] up to 50%, **PROVIDED** that the reduction in both para 4(c) and 4(d) shall not exceed 50% of the backpay payable under para 4(a).

   (e) **Bonus** and **pay *in lieu* of leave not taken** and other **contractual payments** may also be ordered to be paid.

(f) If there are several claimants in a case and they are unemployed for varying periods, any backpay awarded should reflect the periods of unemployment and amount of pay obtained.

Example (for guidance only):

1st Claimant	–	Got job immediately	– 50%
2nd Claimant	–	Got job 6 months later	– 63%
3rd Claimant	–	Got job 12 months later	– 75%
4th Claimant	–	Got job 18 months later	– 88%
5th Claimant	–	Got job 24 months later	– 100%
6th Claimant	–	Failed to get a job	– 100%

Sgd.
(FONG SENG YEE)
President
Industrial Court
Kuala Lumpur
29th June, 1987

SULIT

[26] A careful reading of the said Practice Note will reveal that it is silent on the issue of whether the worker is still eligible to be reinstated at the material time when the award is made. The Practice Note is in reality an internal administrative circular meant to be a guideline in calculating compensation. Such circular does not have the force of law. The Practice Note cannot be construed as a statement of a legal principle. It will be erroneous to do so. The Practice Note cannot be taken to be a concept stipulating that it is a *carte blanche* for compensation to be awarded (in all cases) *in lieu* of reinstatement.

Conclusion

[27] For the above reasons, we will answer the leave question in the negative. In the result, we allow the appeal and set aside the orders made by the courts below, in respect of compensation *in lieu* of reinstatement of the first respondent. Consequentially, we order the first respondent to return to the appellant, the sum paid by the appellant as compensation *in lieu* of reinstatement. In the circumstances of the case, we shall not make any order as to costs.